

Timmerman



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: J.P. Sulzbach, Inc.

File: B-234004

Date: March 14, 1989

DIGEST

1. A bid accompanied by an altered bid bond--where the penal sum of the bond has been typed over a whited-out figure without evidence in the bid documents or the bond itself that the surety had consented to the alteration--properly was rejected as nonresponsive.

2. Protest that agency should not be allowed to reject protester's nonresponsive bid because it led the firm to believe it would receive award is without merit where agency did not actually enter into a contract with the protester.

DECISION

J.P. Sulzbach, Inc. protests the rejection of its low bid as nonresponsive for failing to submit a valid bid bond as required by invitation for bids (IFB) No. N62472-84-B-4717, issued by the Navy for refurbishing deep water wells at the Naval Air Development Center, Pennsylvania.

We deny the protest.

The IFB required that all bids of \$25,000 or greater be accompanied by a bid guarantee in the amount of 20 percent of the bid price not to exceed \$3 million. Sulzbach's bid bond was for a penal sum of \$48,000. The number "48" was typed over a whited-out area. According to a letter from the bonding company submitted after the September 27, 1988, bid opening date, the original amount was "40." The Navy determined that the bond was unacceptable because it found that there was no evidence in either the bid documents or the bond that the surety had consented to and agreed to be bound by the alteration. After notifying Sulzbach that its bid was nonresponsive, the contracting officer canceled the

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solicitation because he found the remaining two bids to be substantially in excess of the government estimate.

As a threshold matter, the Navy asserts that Sulzbach's protest should be dismissed since the agency had a reasonable basis for cancellation of the solicitation and therefore the protest has become academic. However, since the agency does not contend that the protester's bid was also excessive, if Sulzbach's bid were found to be responsive it would be eligible for award. Accordingly, we have no basis to dismiss the protest.

The protester maintains that nothing prevents the government from enforcing the obligation of its surety. In this regard, Sulzbach argues that the letter submitted after bid opening by the surety evidences that the alteration was authorized and that the surety agreed to be bound. Additionally, Sulzbach argues that the Navy should not be allowed to reject its bid since the Navy led the firm to believe that it was the successful bidder. According to Sulzbach, the agency orally represented to the firm several times over a 2-month period that it would receive award.

The submission of a required bid bond is a material condition of responsiveness with which there must be compliance at the time of bid opening. Kinetic Builders, Inc., B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342. Since a material alteration of a bid bond made without evidence of the surety's consent discharges the surety from liability, it renders the bid nonresponsive. Giles Management Constructors, Ltd., B-227982, Sept. 14, 1987, 87-2 CPD ¶ 248. It is not relevant that the surety agreed after bid opening to be bound by the full amount of the bond. A material defect in a bid bond cannot be explained or corrected after opening since this would place the surety in a position to disavow its obligation thus compromising the integrity of the sealed bidding system by permitting the bidder to decide after bid opening whether or not to make its bid acceptable. Southland Construction Co., B-196297, Mar. 14, 1980, 80-1 CPD ¶ 199. Thus, we find the agency properly rejected Sulzbach's bid as nonresponsive.

The protester also argues that its bid should not be rejected since it was led to believe that it would receive the award. The government cannot be required to accept a nonresponsive low bid just because it did not recognize the defect in the bid until after it had conducted a preaward survey and determined that adequate funding for the project existed. The action necessary to bind the government to a contract is its acceptance of an offer, and the acceptance

must be clear, unequivocal and unconditional. American Management Co., B-228279 et al., Jan. 15, 1988, 88-1 CPD ¶ 38. The record does not show and the protester does not contend that the Navy ever entered into a contract with it. We therefore find this argument without merit.

The protest is denied.

for Seymour E. Hinchman
James F. Hinchman
General Counsel